

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

<b>MARY A. POWE</b>	)	
Claimant	)	
	)	
VS.	)	
	)	
<b>VENATOR GROUP</b>	)	
Respondent	)	Docket No. <b>258,968</b>
	)	
AND	)	
	)	
<b>LUMBERMEN'S MUTUAL CASUALTY</b>	)	
Insurance Carrier	)	
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<b>MARY A. POWE</b>	)	
Claimant	)	
	)	
VS.	)	Docket No. <b>259,985</b>
	)	
<b>ARMOUR SWIFT ECHRICH</b>	)	
Self-Insured Respondent	)	

**ORDER**

Claimant as well as Venator and its insurance carrier request review of the November 30, 2006 Award by Administrative Law Judge Bryce D. Benedict. The Board heard oral argument on March 6, 2007.

**APPEARANCES**

John J. Bryan of Topeka, Kansas, appeared for the claimant. Michelle D. Haskins of Kansas City, Missouri appeared for Venator Group and its insurance carrier. Mark E. Kolich of Lenexa, Kansas, appeared for the self-insured Armour Swift Echrich.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award.

**ISSUES**

These two separate claims were consolidated for litigation. Venator, (Docket No. 258,968) asserted that claimant suffered an intervening accident in her subsequent employment with Armour. Conversely, Armour (Docket No. 259,985) asserted that claimant's condition was a natural and probable consequence of the injury she suffered working for Venator.

The Administrative Law Judge (ALJ) determined claimant's condition was a natural and probable consequence of the injury she suffered in Docket No. 258,968 while working for Venator. The ALJ further determined claimant made timely written claim to Venator; that res judicata (prior preliminary hearing orders) did not bar her claim against Venator; the claim was not barred by failure to proceed to final hearing within five years from the date of filing the application for hearing (lack of prosecution); that the ALJ had the authority to deny claimant and Armour's motion to dismiss the claim against Armour; that claimant did not meet her burden of proof regarding payment of certain medical bills; that Venator was entitled to a credit for temporary total disability compensation paid by Armour and Armour was entitled to reimbursement from the Kansas Workers Compensation Fund (Fund) for those payments but claimant was not entitled to duplicate temporary total disability compensation payments from Venator; that claimant's functional impairment was 15 percent and she suffered a 45 percent work disability commencing February 2, 2004, based upon a 55 percent wage loss and a 35 percent task loss.

The claimant requested review of the award and argues the ALJ erred in allowing Venator credit for temporary total disability compensation payments made by Armour. Claimant argues that Venator is liable for all compensation awarded and as it has not paid any temporary total disability compensation it is now required to pay that benefit to claimant. The temporary total disability compensation payments later reversed on appeal cannot be recovered from claimant. Consequently, Armour must recover such payments from the Fund. Claimant further argues the task loss was 40 percent. Finally, claimant argues she met her burden of proof to establish the medical bills be determined to be authorized and that ongoing medical treatment should be ordered.

The respondent, Venator, and its insurance carrier requested review of the following issues: (1) timely written claim; (2) whether the claim is barred by K.S.A. 44-523(f) and/or res judicata; (3) intervening accident; and (4) nature and extent of disability. Venator argues the claimant's claim should be barred not only according to res judicata but also according to K.S.A. 44-523(f). Venator further argues the respondent, Armour is liable for the compensation due in this claim.

The self-insured respondent, Armour, requests the Board to affirm the ALJ's determination that Venator is responsible for claimant's award. Armour further argues that

Venator should be required to reimburse it for temporary total disability compensation payments made to claimant and, consequently, it would then be appropriate for Venator to receive a credit for those payments in the final award. Finally, Armour notes that K.A.R. 51-3-1 provides that compensable cases shall be determined and terminated by voluntary dismissal by the parties. Armour argues that approval by an ALJ is not required and it was error for the ALJ to deny claimant and Armour's motion to dismiss the claim against Armour.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Claimant was originally injured on September 16, 1998, while working for Venator Group, when the forklift she was driving was struck by another forklift. Claimant described a whiplash type injury to her neck with pain in her right arm and wrist as well as her lower back.

After the accident the claimant was taken to the nurse's station and was required to fill out a workers compensation sheet and an accident report. She testified that she signed both documents and would not have received additional medical treatment without filling out and signing the forms. When Dr. Michael Mosier prescribed medications claimant went back to the plant nurse who provided claimant with an slip of paper to take to the pharmacy so respondent would pay for the prescription. The plant nurse also gave claimant a mileage sheet to fill out for her trips to physical therapy sessions. The claimant turned in the filled out mileage sheet and was paid for her mileage. All these documents were prepared and submitted within the first week after the accident.

Dr. Mosier took claimant off work for a week, prescribed medications and sent claimant for physical therapy. Claimant received conservative treatment and was released on light duty for a week and then was released back to work because claimant stated she told the doctor she was doing better than what she was. Claimant received conservative treatment and by September 30, 1998, was "ready to go back to work". The September 28, 1998 letter from Heather Thiessen, CPTA, from the Geary Rehabilitation and Fitness Center to M. Mosier, M.D., indicated that claimant was feeling better and on a scale from one to ten, had a zero level of pain. Ms. Thiessen also noted that claimant indicated she was ready to return to full duty.

In Dr. Mosier's office notes of September 30, 1998, it stated that with regard to claimant's neck and left shoulder, she was "ready to go back to work". Claimant was noted to be one hundred percent improved as to her neck, and her back was "fine". But at the

first preliminary hearing the claimant denied she made those statements. There was an indication that her left shoulder continued to catch, but this condition appeared temporary.

Claimant returned to work with Venator. Claimant sought additional treatment for her shoulder and neck in April 1999. She was seen at that time by Bryan Calkins, a physician's assistant. She was returned to work with no restrictions. However, claimant testified that she missed a lot of work because of the pain in her back and neck and often worked while taking pain medication.

Claimant's employment with Venator was terminated in October 1999. Claimant allegedly was terminated for violation of respondent's no call no show policy. Although claimant had not received warnings about her attendance before the accident, afterwards she received complaints about her attendance. She received warnings four separate times and was then terminated. Claimant was at work and her supervisor came and told her she was terminated. Claimant testified that she was not told why she was being terminated. Claimant denied that she failed to call in when she was unable to get to work and many of her absences were due to pain from her work-related injury.

On February 28, 2000, claimant began working for Armour Swift-Eckrich, working 10.5 -hour shifts. Claimant's job was placing packages of sausages in a box. After several months at Armour, claimant began experiencing a return of her symptoms. In May 2000 claimant saw Venator's company doctor with ongoing complaints of neck and shoulder pain as well as headaches. Claimant contended the pain had been that way since the 1998 accident. She was referred back to Bryan Calkins, physician's assistant, in June 2000. Mr. Calkins advised that, in his opinion, claimant's symptoms were attributable to her recent employment at Armour. Venator then declined to provide additional treatment. But claimant maintained that her pain had remained constant since her injury at Venator.

Claimant worked through January 28, 2001, when she was taken off of work. She remained off work until September 2001, at which time she returned to work, performing light duty. A February 8, 2001 MRI revealed a herniated disk at C6-7. A cervical fusion was recommended. Dr. Jimmy W. Jenkins, a family practitioner from Junction City, noted in his January 19, 2001 report that claimant's condition had worsened with "a different occupation".

In December 2001 claimant was moved to a position at Armour that required her to pack bigger sausages which required more pulling and turning. As a result her symptoms worsened. And the conveyor belt line was higher. Claimant testified that after she went to work at her new job with Armour, her condition worsened. She advised her supervisor, Kathy Bahn, that there was too much pulling and twisting involved.

After returning to light duty in September 2001, claimant continued until December, when she was placed on a production line. Claimant worked the production line through January 22, 2002, and was then taken off the line and has not worked since.

At the first preliminary hearing the claimant testified that her job at Armour did not result in additional injury or trauma and it was a light-duty job which allowed to move around because the machines constantly broke down.

At the second preliminary hearing the claimant testified that between the first accident and November 21, 2001, her neck and arm problems have never gone completely away. And that since the accident her pain has worsened.

At the third preliminary hearing the claimant alleged a worsening at her work for Armour after December 2001 when she was placed on a line working with Polish sausages. But she testified that the doctors for Venator had ignored her problem which persisted. And the neck and arm pain persisted. But surgery for her neck was recommended by Dr. K.N. Arjunan in May 2001 before the alleged worsening of her condition in December while working for Armour.<sup>1</sup> Claimant consistently testified that she only told Dr. Mosier that she felt 100 percent improved because she needed to go back to work because she needed a paycheck. But since December 2001 her pain complaints have increased while working the alleged more physically demanding job handling the Polish sausages.

At the request of Armour's attorney, the claimant was examined on November 16, 2005, by Dr. John M. Ciccarelli, a board certified orthopedic surgeon. The doctor reviewed claimant's medical records and performed a physical examination of claimant. The doctor diagnosed claimant with cervical disk protrusions which caused chronic neck pain and upper extremity radicular complaints. Although her condition would normally be addressed by surgery, the claimant had an underlying congestive heart problem which made her a high risk for surgery. The doctor opined that claimant has a 15 percent permanent partial functional impairment pursuant to the *AMA Guides*<sup>2</sup>. The doctor recommended claimant engage in continuing employment that would avoid excessive repetitive lifting or work above shoulder height with a weight limit from 15 to 20 pounds above shoulder height. The doctor further opined claimant could no longer perform 4 of the 15 tasks on Mr. Langston's task list. And the doctor opined claimant could no longer perform 4 of the 31 tasks on Mr.

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<sup>1</sup> The surgery was not performed because claimant had an underlying congestive heart problem which made her a high risk for surgery.

<sup>2</sup> American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

Cordray's task list. Dr. Ciccarelli concluded the cause of claimant's cervical spine herniation was the accident in 1998 at Venator.

Dr. Ciccarelli based his opinion that the 1998 accident was the cause for claimant's condition upon the fact that claimant's symptoms never fully improved before her employment with Armour.

At the request of claimant's attorney, the claimant was examined on April 25, 2005, by Dr. Theodore L. Sandow, a board certified orthopedic surgeon. Dr. Sandow diagnosed claimant with disk protrusions at C5, C6, and C7 as well as degenerative joint and disk disease at C5-6 and C6-7. The doctor further diagnosed claimant with chronic lumbosacral strain. Dr. Sandow opined the claimant's injury working for Venator caused her neck, right shoulder and low back injuries. The doctor opined that the claimant has a 15 percent permanent partial functional impairment based upon DRE Cervicothoracic Category III of the *AMA Guides*. Dr. Sandow imposed permanent restrictions that claimant should avoid repetitive bending, stooping, twisting or lifting over 20 pounds. Claimant should also avoid repetitive or forceful use of her upper extremities and use of her upper extremities above shoulder height. Dr. Sandow concluded claimant could no longer perform 15 of 15 tasks compiled by vocational expert Bud Langston.

Dr. Sandow testified that the EMG performed on claimant on April 3, 2001, revealed chronic right C7 radiculopathy. And Dr. Sandow agreed that it was probable such condition related back to the 1998 incident at Venator. Dr. Sandow further opined that the incident at Venator in 1998 was either the cause or a substantial contributing factor to claimant's herniation of the disk in the neck. Moreover, Dr. Sandow noted that without surgery or appropriate treatment the claimant's symptoms would continue if not progress. The doctor testified:

Q. And you were asked a question earlier about whether or not this lady should have surgery, and I think you indicated that without surgery or appropriate treatment, that the symptoms would be expected to progress?

A. At least continue, if not progress.

Q. So regardless of what somebody does after they are injured like this, if they don't receive appropriate medical attention, it is reasonable to expect the continuation and possibly the progression or worsening of symptoms?

A. Yes.<sup>3</sup>

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<sup>3</sup> Sandow Depo. (Oct. 27, 2005) at 22-23.

Dr. Sandow concluded that all of his impairment rating and restrictions related back to the 1998 injury claimant suffered at Venator.

A second deposition was taken of Dr. Sandow on May 31, 2006, to afford Venator's counsel the opportunity to cross-examine the doctor. At this time the doctor changed his opinion to conclude that he would attribute 50 percent of his impairment to claimant's injury at Venator and 50 percent to the aggravation of that condition suffered working for Armour. But the doctor further agreed that any aggravation claimant suffered at Armour was a natural consequence of the original injury at Venator in 1998.

At claimant's counsel's request, claimant met with Bud Langston, a vocational rehabilitation consultant. Mr. Langston prepared a task list of 15 tasks claimant performed in the 15-year period before her injury. Mr. Langston opined claimant's wage earning ability ranges from \$6 to \$7 an hour.

Terry L. Cordray, a vocational rehabilitation counselor, conducted a personal interview with claimant on September 11, 2006, at the request of Armour's attorney. He prepared a task list of 31 tasks claimant performed in the 15-year period before her injury. Mr. Cordray opined claimant was capable of earning at least \$8 an hour. He noted claimant was neither working nor looking for jobs. He further noted he attributed 3 tasks to a job claimant had with a grocery store. It should be noted this job was not listed on Mr. Langston's task list.

Respondent Venator initially argues claimant did not make timely written claim. The Board disagrees.

The written claim statute, K.S.A. 44-520a(a), provides in part:

No proceedings for compensation shall be maintainable under the workmen's compensation act unless a written claim for compensation shall be served upon the employer by delivering such written claim to him or his duly authorized agent, or by delivering such written claim to him by registered or certified mail within two hundred (200) days after the date of the accident, or in cases where compensation payments have been suspended within two hundred (200) days after the date of the last payment of compensation; or within one (1) year after the death of the injured employee if death results from the injury within five (5) years after the date of such accident.

The Kansas Supreme Court has stated that the purpose for written claim is to enable the employer to know about the injury in time to investigate it.<sup>4</sup> The same purpose

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<sup>4</sup> *Craig v. Electrolux Corporation*, 212 Kan. 75, 82, 510 P.2d 138 (1973).

or function has, of course, been ascribed to the requirement for notice found in K.S.A. 44-520.<sup>5</sup> Written claim is, however, one step beyond notice in that it requires an intent to ask the employer to pay compensation. In *Fitzwater*<sup>6</sup>, the Kansas Supreme Court described the test as follows:

In determining whether or not a written instrument is in fact a claim the court will examine the writing itself and all the surrounding facts and circumstances, and after considering all these things, place a reasonable interpretation upon them to determine what the parties had in mind. The question is, did the employee have in mind compensation for his injury when the instrument was signed by him or on his behalf, and did he intend by it to ask his employer to pay compensation?

In addition, the Board considers the Supreme Court's opinion in *Ours*<sup>7</sup> to be instructive.

The written claim required by K.S.A. 1972 Supp. 44-520a to be served upon the employer under the Workmen's Compensation Act need not be signed by or for the claimant. The written claim may be presented in any manner and through any person or agency. The claim may be served upon the employer's duly authorized agent.<sup>8</sup>

As previously noted, after the accident the claimant was taken to the nurse's station and was required to fill out a workers compensation sheet and an accident report. She testified that she signed both documents and would not have received additional medical treatment without filling out and signing the forms. When Dr. Mosier prescribed medications claimant went back to the plant nurse who provided claimant with a slip of paper to take to the pharmacy so respondent would pay for the prescription. The plant nurse also gave claimant a mileage sheet to fill out for her trips to physical therapy sessions. The claimant turned in the filled out mileage sheet and was paid for her mileage. All these documents were clearly prepared and submitted with the intention that respondent pay compensation for the work-related injury. And the documents were prepared and submitted within the first week after the accident. The Board affirms the ALJ's determination claimant made timely written claim.

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<sup>5</sup> *Pike v. Gas Service Co.*, 223 Kan. 408, 573 P.2d 1055 (1978).

<sup>6</sup> *Fitzwater v. Boeing Airplane Co.*, 181 Kan. 158, 166, 309 P.2d 681 (1957).

<sup>7</sup> *Ours v. Lackey*, 213 Kan. 72, 515 P.2d 1071 (1973).

<sup>8</sup> *Id.* at Syl. ¶ 4.

Respondent Venator next argues that the doctrine of res judicata should be applied because of the preliminary finding that claimant suffered accidental injury at Armour after leaving employment with Venator. The very nature of a preliminary order is that it only remains effective until a final order is entered. There is no limit on the number of preliminary hearings that can be held and preliminary findings are not binding upon final hearing on the claim. The doctrine of res judicata does not prevent reconsideration of all the issues at the regular hearing irrespective of the preliminary orders entered in a workers compensation case. As provided by the Act, preliminary hearing findings are not binding but subject to modification upon a full hearing on the claim.<sup>9</sup> In this instance the preliminary finding claimant suffered accidental injury at Armour is not binding upon a full hearing on the claim and the doctrine of res judicata is not applicable.

Respondent Venator's primary argument is that claimant suffered an intervening accident during her employment with Armour and that respondent should be liable for claimant's permanent impairment.

The ALJ's Award contains a detailed recitation of the pertinent facts and law regarding this issue. The Board adopts those findings. In short, the claimant testified that she never recovered from the forklift accident at Venator. Although there appears to be some contrary statements from claimant, she explained she had to downplay her pain in order to return to work at Venator because she simply needed a paycheck. Dr. Ciccarelli concluded the cause of claimant's cervical spine herniation was the accident in 1998 at Venator. Dr. Sandow agreed and although he later equivocated and attempted to attribute a portion of the permanency to claimant's work activities at Armour the doctor finally agreed that any aggravation claimant suffered at Armour was a natural consequence of the original injury at Venator in 1998.

In *Logsdon*<sup>10</sup> the Kansas Court of Appeals noted that in the determination whether an injured worker's condition is a natural consequence of the primary injury or a new and distinct injury a distinguishing fact is whether the prior underlying injury had fully healed. If not, subsequent aggravation of the injury even when caused by an unrelated accident or trauma may still be a natural consequence of the original injury. Consequently, claimant's testimony establishes that after the initial injury her condition never had fully healed and the testimony of Drs. Ciccarelli and Sandow establish that claimant's condition was a natural consequence of the original injury at Venator in 1998. The Board affirms the ALJ's determination that Venator is liable for claimant's compensation benefits.

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<sup>9</sup> K.S.A. 44-534a(a)(2).

<sup>10</sup> *Logsdon v. Boeing Co.*, 35 Kan. App. 2d 79, 128 P.3d 430 (2006).

Because claimant's injuries comprise more than a "scheduled" injury as listed in K.S.A. 1999 Supp. 44-510d, her entitlement to permanent disability benefits is governed by K.S.A. 1999 Supp. 44-510e(a), which provides, in part:

Permanent partial general disability exists when the employee is disabled in a manner which is partial in character and permanent in quality and which is not covered by the schedule in K.S.A. 44-510d and amendments thereto. The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein. **An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.** (Emphasis added.)

But that statute must be read in light of *Foulk*<sup>11</sup> and *Copeland*.<sup>12</sup> In *Foulk*, the Kansas Court of Appeals held that a worker could not avoid the presumption against work disability as contained in K.S.A. 1988 Supp. 44-510e(a) (the predecessor to the above-quoted statute) by refusing to attempt to perform an accommodated job, which the employer had offered. And in *Copeland*, the Kansas Court of Appeals held, for purposes of the wage loss prong of K.S.A. 44-510e(a), that a worker's post-injury wage should be based upon the ability to earn wages rather than the actual post-injury wages being earned when the worker failed to make a good faith effort to find appropriate employment after recovering from the work injury.

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<sup>11</sup> *Foulk v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

<sup>12</sup> *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

If a finding is made that a good faith effort has not been made, the factfinder *[sic]* will have to determine an appropriate post-injury wage based on all the evidence before it, including expert testimony concerning the capacity to earn wages.<sup>13</sup>

The Kansas Court of Appeals in *Watson*<sup>14</sup> more recently held that the failure to make a good faith effort to find appropriate employment does not automatically limit the permanent partial general disability to the functional impairment rating. Instead, the Court reiterated that when a worker failed to make a good faith effort to find employment, the post-injury wage for the permanent partial general disability formula should be based upon all the evidence, including expert testimony concerning the worker's retained capacity to earn wages.

In determining an appropriate disability award, if a finding is made that the claimant has not made a good faith effort to find employment, the factfinder *[sic]* must determine an appropriate post-injury wage based on all the evidence before it. This can include expert testimony concerning the capacity to earn wages.<sup>15</sup>

Respondent Venator argues that claimant should be limited to her functional impairment because her employment was terminated for violation of respondent's attendance policies. The ALJ analyzed the evidence regarding this issue in the following fashion:

Venator argues the Claimant was fired for cause. The Claimant testified that she did not violate Venator's no show-no call policy--that she did call in and report each time she would be missing work. She also testified that some days she missed work because she was in too much pain to work. Venator has produced no credible evidence to support its allegation that the Claimant willingly violated its attendance policies. The Court finds it has not been established that the Claimant was fired for any bad faith on her part, thus her wage at Venator will not be imputed to her.<sup>16</sup>

The Board agrees and affirms. Consequently the claimant is entitled to a work disability analysis. The claimant has not sought employment since she left work with Armour in January 2002. Claimant has not made a good faith effort to locate appropriate employment within her medical restrictions. Accordingly a wage must be imputed to claimant based upon the evidence. The ALJ concluded the claimant retains the ability to

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<sup>13</sup> *Id.* at 320.

<sup>14</sup> *Watson v. Johnson Controls, Inc.*, 29 Kan. App. 2d 1078, 36 P.3d 323 (2001).

<sup>15</sup> *Id.* at Syl. ¶ 4.

<sup>16</sup> ALJ Award (Nov. 30, 2006) at 10.

earn \$6.50 an hour or \$260 per week based upon the testimony of Mr. Langston. This represents a 55 percent wage loss. The Board agrees and affirms.

The ALJ determined that Mr. Cordray had 30 non-duplicative tasks on his list and although Mr. Langston had 15 tasks, the ALJ added 3 (for claimant's admitted job at a grocery store). Dr. Cicaralli offered task loss opinions based upon both vocational experts task lists while Dr. Sandow only offered a task loss opinion based upon Mr. Langston's task list. The ALJ determined that there was no compelling reason to afford more weight to one physician's task loss opinion over the other and averaged the opinions. The Board agrees but notes that an average of the three task loss opinions calculates to a 39 percent task loss. Averaging the claimant's 55 percent wage loss with a 39 percent task loss results in a 47 percent work disability and the ALJ's Award is modified to reflect claimant suffered a 47 percent work disability.

Respondent Venator argues that the claim against it should be dismissed as the application for hearing was filed on September 12, 2000, but the case did not proceed to a full hearing within five years of that date. Consequently, Venator argues the case should be dismissed pursuant to K.S.A. 44-523(f). The ALJ found that K.S.A. 2006 Supp. 44-523(f) involved a substantive right, does not have retroactive application and is not applicable to this case. The Board agrees.

The Kansas Legislature amended K.S.A. 44-523(f) effective July 1, 2006, to provide:

Any claim that has not proceeded to final hearing, a settlement hearing, or an agreed award under the workers compensation act within five years from the date of filing an application for hearing pursuant to K.S.A. 44-534, and amendments thereto, shall be dismissed by the administrative law judge for lack of prosecution. The administrative law judge may grant an extension for good cause shown, which shall be conclusively presumed in the event that the claimant has not reached maximum medical improvement, provided such motion to extend is filed prior to the five year limitation provided for herein. This section shall not affect any future benefits which have been left open upon proper application by an award or settlement.

The general rule of statutory construction is that a statute will operate prospectively unless its language clearly indicates that the legislature intended that it operate retrospectively especially when the amendment to an existing statute creates a new liability not existing before or changes the substantive rights of the parties.<sup>17</sup> Moreover, it is an

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<sup>17</sup> *Halley v. Barnabe*, 271 Kan. 652, 24 P.3d 140 (2001).

axiom of workers compensation law that the substantive rights between the parties are determined by the law in effect on the date of injury.<sup>18</sup>

The amendment to K.S.A. 2006 Supp. 44-523(f) does not express a clear intent that it is to operate retroactively and such an application of the statute could clearly affect claimant's substantive rights. The statutory amendment should be applied prospectively and accord all claims the same five-year period before they are subject to dismissal. Because the substantive rights of the parties to a workers compensation claim are determined by the law in effect on the date of injury the amendment to the statute applies to accidents that occur on or after its effective date. The Board affirms the ALJ's ruling.

The claimant argues that although she received temporary total disability compensation from Armour, as a result of a preliminary order entered in the litigation of these consolidated claims, she should now receive the same payment of temporary total disability compensation from Venator as it has been determined liable for her compensation. The Board disagrees.

A final modification to the Award involves the ALJ's determination that Armour be reimbursed from the Fund for monies paid pursuant to an earlier order of the ALJ. K.S.A. 1999 Supp. 44-556(e) states in part:

If compensation, including medical benefits, temporary total disability benefits or vocational rehabilitation benefits, has been paid to the worker by the employer, the employer's insurance carrier or the workers compensation fund during the pendency of review under this section, and pursuant to K.S.A. 44-534a or K.S.A. 44-551, and amendments thereto, and the employer, the employer's insurance carrier or the workers compensation fund, which was held liable for and ordered to pay all or part of the amount of compensation awarded by the administrative law judge or board, is held not liable by the final decision on the review by either the board or an appellate court for the compensation paid or is held liable on such appeal or review to pay an amount of compensation which is less than the amount paid pursuant to the award, **then the employer, employer's insurance carrier or workers compensation fund shall be reimbursed by the party or parties which were held liable on such review to pay the amount of compensation to the worker that was erroneously ordered paid. The director shall determine the amount of compensation which is to be reimbursed to each party under this subsection, if any, in accordance with the final decision on the appeal or review and shall certify each such amount to be reimbursed to the party required to pay the amount or amounts of such reimbursement.** Upon receipt of such certification, the party required to make the reimbursement

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<sup>18</sup> *Lyon v. Wilson*, 201 Kan. 768, 443 P.2d 314 (1968).

shall pay the amount or amounts required to be paid in accordance with such certification. No worker shall be required to make reimbursement under this subsection or subsection (d). (Emphasis added.)

K.S.A. 1999 Supp. 44-556(e) requires that when insurance carriers or the Fund overpay as a result of orders, rather than seeking reimbursement from the Fund, instead a determination is to be made by the Director's office as to what amounts would be due and owing from the various insurance carriers to other insurance carriers involved in the litigation. As Venator will reimburse Armour for temporary total disability compensation paid claimant, as well as medical compensation, it is appropriate for Venator to receive credit in the award for the amount of temporary total disability compensation paid claimant. As claimant has already received the temporary total disability compensation she is not entitled to a duplicate payment of those benefits. Consequently, the ALJ's Award is modified to reflect Armour is to be reimbursed from Venator but the determination that Venator will receive credit for that payment in the calculation of the compensation due is affirmed.

Moreover, the Board agrees and adopts the ALJ's finding that claimant failed to meet her burden of proof to establish that the medical bills introduced at the regular hearing should be repaid as authorized medical treatment.

Finally, respondent Armour argues the ALJ erred when, early in the litigation of these cases, he refused to sign the claimant and Armour's motion to dismiss the case against Armour. Based upon the foregoing findings that issue is now rendered moot.

### **AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Bryce D. Benedict dated November 30, 2006, is modified to reflect claimant's work disability is 47 percent and that Venator reimburse Armour for temporary total disability compensation as well as medical compensation paid claimant. The Award is affirmed in all other respects.

The claimant is entitled to 132.43 weeks of temporary total disability compensation at the rate of \$366 per week or \$48,469.38 followed by 139.86 weeks of permanent partial disability compensation at the rate of \$366 per week or \$51,188.76 for a 47 percent work disability, making a total award of \$99,658.14.

As of July 27, 2007, there would be due and owing to the claimant 132.43 weeks of temporary total disability compensation at the rate of \$366 per week in the sum of \$48,469.38 plus 139.86 weeks of permanent partial disability compensation at the rate of

\$366 per week in the sum of \$51,188.76 for a total due and owing of \$99,658.14, which is ordered paid in one lump sum less amounts previously paid by Armour.

**IT IS SO ORDERED.**

Dated this 31st day of July 2007.

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BOARD MEMBER

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BOARD MEMBER

**CONCURRING OPINION**

The undersigned Board Members concur in the result reached above but for a different legal reason.

In *Owen Lumber Co.*<sup>19</sup>, the Kansas Supreme Court stated:

[W]hile the distinction between procedural, remedial, and substantive laws is an important part of the analysis and a distinction we continue to draw [citation omitted], our analysis does not end there. As stated by one commentator:

‘[T]his formulation of the rule [that the legislature may modify the remedies for the assertion or enforcement of a right], in addition to ignoring the other factors relevant in determining the constitutionality

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<sup>19</sup> *Owen Lumber Co. v. Chartrand*, 276 Kan. 218, 223, 73 P.3d 753 (2003) (citing *Resolution Trust Corp. v. Fleischer*, 257 Kan. 360, 364-65, 892 P.2d 497 [1995] and quoting Hochman, *The Supreme Court and the Constitutionality of Retroactive Legislation*, 73 Harv. L. Rev. 692, 711-12 [1960]).

of a particular statute, is an oversimplification of the manner in which the [United States Supreme] Court weighs a statute's effect on previously acquired rights. The Court has recognized that the removal of all or a substantial part of the remedies for enforcing a private contract may have the same practical effect as an explicit denial of the right. Thus the relevant factor in determining the weight to be given to the extent to which a preexisting right is abrogated is not whether the statute abolishes rights or remedies, but rather the degree to which the statute alters the legal incidents of a claim arising from a preenactment transaction; the greater the alteration of these legal incidents, the weaker is the case for the constitutionality of the statute.'

Under certain circumstances, K.S.A. 2006 Supp. 44-523(f) could affect the substantive rights of a claimant if applied retroactively and, therefore, it is not a procedural amendment only. But in those cases where the five-year period had not expired by the time the statute took effect and, therefore, claimant had time to prosecute the claim, the statute's effect may not be procedural as to that claim and the amendment could be applied retroactively.

The new subsection would affect a claimant's substantive rights if its dismissal provision was applied in a case where the time limit ran before the subsection became effective, thus "blindsiding" the claimant with a dismissal. Conversely, if the five-year period had not expired by the time the statute took effect the claimant may have time to proceed to final hearing or show good cause for an extension of time. Under such circumstances the claimant should have a reasonable opportunity to comply with the new subsection's procedural requirement before it is given retroactive application. The test is what constitutes a reasonable time from the effective date of the amendment until the five-year period expires. In addition, there was also a period of time from the date the Legislature enacted the amendment to K.S.A. 44-523 until it became effective. This should also alert counsel to the need to prosecute a claim and be factored in to the determination of what constitutes a reasonable time.

The date upon which K.S.A. 44-523(f) operates is not the date the application for hearing was filed, but five years after that date. The statute should not operate retroactively if it is applied to an application's "fifth anniversary" date that fell before the statute became effective. But in those cases where the application's fifth anniversary falls after the effective date of the statute, the statute may be applied with retroactive effect where it is reasonable to do so. If a fifth anniversary fell after, but very near the statute's effective date, such that the claimant had no reasonable chance to comply, fairness may require some "grace period."

The Legislature has the power to change the conditions by which an injured worker must maintain an action against an employer for workers compensation benefits. Furthermore, statutes of limitations have been held to be remedial and can be applied retrospectively. Accordingly, the statute need not be applied evenly and equally to all claims. All claims are not entitled to the same five-year period before they are subject to dismissal. Because the statute is remedial, it can operate retrospectively, to affect accidents that occurred before its effective date. Instead, the test is what constitutes a reasonable time after the enactment of K.S.A. 2006 Supp. 44-523(f) for the claimant to pursue her rights and either proceed to final hearing or obtain an extension from the ALJ. The statute should be applied to accidents that occurred before the effective date of the statute only where there has been a reasonable opportunity after the effective date of the statute to protect claimants' rights.

K.S.A. 2006 Supp. 44-523(f) is to be applied retroactively to accidents occurring before July 1, 2006, the effective date of the statute, only when it is reasonable to do so. Under the facts of this case, the time limit ran before the subsection became effective and it would be unreasonable and affect claimant's substantive rights to apply K.S.A. 2006 Supp. 44-523(f) to this claim. Accordingly, the undersigned Board Members, based upon the foregoing legal reasoning, concur in the majority's decision to deny the request to dismiss this claim for lack of prosecution pursuant to K.S.A. 2006 Supp. 44-523(f).

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BOARD MEMBER

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BOARD MEMBER

c: John J. Bryan, Attorney for Claimant  
Michelle D. Haskins, Attorney for Venator & Lumbermen's Mutual  
Mark E. Kolich, Attorney for Armour Swift Echrich  
Bryce D. Benedict, Administrative Law Judge